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Supreme Court, U.S.
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No. 02-1377

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY FOR THE PETITIONER

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REPLY FOR THE PETITIONER

1. **Introduction.** The government does not dispute — and, indeed, concedes (Opp. 6) — that there is a conflict among the courts of appeals on the issue of whether an individual who has shown that the United States is "liable" for an "intentional or willful" violation of the Privacy Act that caused an "adverse effect" must further prove some measure of "actual damages" to be entitled to a Section 552a(g)(4) statutory damages award of $1,000. Pet. 11-12. Nor does the government dispute Doe's showing that this issue is an important and recurring question that merits this Court's review. Pet. 13-16.

Instead, the government contends (Opp. 6-8) that the conflict is neither "mature" nor "concrete." As Doe showed in his petition (Pet. 11-12), and shows again below, the government is wrong. The conflict is mature, concrete, and — underscoring the need for immediate review — has deepened since Doe filed his petition. The government devotes the remainder of its opposition (Opp. 9-11) to a merits argument in support of its interpretation of the Privacy Act. Doe, of course, agrees that the Court should address the merits of this issue. But the government's merits arguments only highlight the statutory anomalies created by its preferred interpretation.

2. **The circuit conflict is mature, concrete, and deepening.** Forced to admit the circuit conflict on the question presented (Opp. 6), the government insists it is not "mature" or "concrete." This position is both contrary to the government's own statement to the court below — where it candidly "acknowledge[d]" that "circuits have reached the opposite result and awarded $1,000 recoveries without requiring proof of actual damages" (Brief for Appellee-Cross-Appellant, *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002), at 21) — and wrong. This position is also contrary to the majority and dissenting opinions below, which acknowledged the pervasive conflict. App. 12a & n.3, 33a-34a. Moreover, since

the petition was filed, the First Circuit has deepened the split, which now involves eight courts of appeals divided six-to-two.

In *Orekoya v. Mooney*, No. 02-1306, __ F.3d __, 2003 WL 21093551 (1st Cir. May 15, 2003), the First Circuit expressly rejected the decision below and instead "join[ed] the rule adopted by the majority of circuits that have addressed this issue" by agreeing "with the dissent in *Doe* that the most natural and reasonable reading of the statute is that statutory damages, if not actual damages, are available to individuals who suffer adverse effects from intentional and willful violations of the act . . . ." *Id.* at *7. The court held that "[i]nherent" in decisions of the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits "is an analysis that Congress would not have granted standing to pursue an action for civil remedies to those who suffered an adverse effect caused by an intentional or willful violation and then afforded no remedy at all for the adverse effect." *Id.* at *6. Morever, the majority rule is "most consistent with the legislative history" and "the interpretation adopted by OMB." *Id.* at *7. The government did not mention the First Circuit's recent decision in its opposition, but it cannot dispute that this express, direct, and thorough rejection of the majority's decision below reveals a "concrete" split of authority.

Even apart from the First Circuit's recent decision, the government's effort (Opp. 6-8) to characterize the conflict as not "mature" or "concrete" fails.

Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982), squarely addressed the question presented here. After holding that appellant's mental injuries were not "actual damages" under the Privacy Act and noting no other proof of actual damages, the Eleventh Circuit was required to — and did — determine whether it could nonetheless uphold the district court's $1,000 statutory damages award. *Id.* at 330-31. The court concluded that Section 552a(g)(4)(A)'s statutory damages provision "avoid[s] a situation in which persons suffering injury had *no*

provable damages and hence *no incentive to sue*." *Id.* (emphasis added). Accordingly, it affirmed the $1,000 statutory damages award despite no proven actual damages. *Id.*

On its face, *Wilborn v. Department of Health and Human Services*, 49 F.3d 597 (9th Cir. 1995), "indicates that the award was made in the absence of some proof of actual damages." Opp. 8. After holding that the disclosure victim was entitled to summary judgment, the Ninth Circuit further held that no remand for an actual damages determination was necessary because the victim had limited his sought-after damages "to the statutory minimum of $1,000." 49 F.3d at 603. The court then expressly endorsed *Fitzpatrick*'s holding that the "purpose of the minimum damage provision is to give those with 'no provable damages' the incentive to sue," and "direct[ed] the entry of judgment . . . in the sum of $1,000." *Id.*

Johnson v. Department of Treasury, 700 F.2d 971 (5th Cir. 1983), held that the "statutory minimum of $1000, of course, is recoverable" without proof of actual damages. *Id.* at 977 & n.12. And this holding was not mere "dictum." Opp. 7. The decision below recognized *Johnson* as a conflicting decision (App. 12a & n.3, 33a-34a), and the First Circuit acknowledged in *Orekoya* that the Fifth Circuit allows statutory damages without proof of actual damages. 2003 WL 21093551, at *6. Most importantly, lower courts in the Fifth Circuit adhere to the rule announced in *Johnson*. *See, e.g, Ramon v. EEOC*, No. H-85-431A, 1986 WL 501, at *5 (S.D. Tex. Nov. 26, 1986), *aff'd*, 844 F.2d 786 (5th Cir. 1988).

Parks v. IRS, 618 F.2d 677 (10th Cir. 1980), did not "decid[e] only that mental distress or psychological harm may constitute actual damages." Opp. 8. Rather, the Tenth Circuit held that a Privacy Act claim is stated "even though the plaintiff suffered no pecuniary loss nor physical harm" where a plaintiff alleges an "adverse effect" in the form of

"psychological harm" and sufficient allegations of "intentional or willful misconduct." 618 F.2d at 683. Congress built into the Privacy Act a "self-help enforcement program" that "encourages the filing of lawsuits, for it is only through this process that the objects of the Act can be realized." *Id.* at 685. Accordingly, the Act "is to be treated in the spirit which attended its enactment" (*id.*), and thus cannot be read to condition statutory damages on proof of actual damages.

Finally, *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984), does not establish that the question presented "remains open in the D.C. Circuit." Opp. 8. *Molerio* did not discuss Section 552a(g)(4) at all. Rather, it held that there was no causal link between the actions alleged to violate the Privacy Act and the claimed adverse effect, thus prohibiting any recovery. 749 F.2d at 826. In contrast, *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989), expressly held that an individual who suffers an adverse effect as a result of an intentional violation of the Privacy Act is "entitled to the greater of $1000 *or* the actual damages sustained." *Id.* at 872 (emphasis added). The government cannot credibly contend that this holding is "ambiguous[]" (Opp. 8); the D.C. Circuit used the very words that the government argues (Opp. 9) unambiguously state a right to an "automatic damages award." Moreover, *Tomasello v. Rubin*, 167 F.3d 612 (D.C. Cir. 1999), which the government does not mention in its opposition, upheld a statutory damages award even though the aggrieved individual neither proved pecuniary losses nor argued that he was entitled to emotional distress damages. *Id.* at 614, 618 & n.6; *see* Pet. 12.

3. **The government's merits arguments only emphasize the statutory anomalies that flow from its preferred interpretation of the Privacy Act.** Doe demonstrated (Pet. 16-18) that the Privacy Act permits an award of $1,000 statutory damages without proof of actual damages. This reading is faithful to Section 552a(g)(4)'s plain text, gives meaning and consistency to each of the Act's civil remedies

provisions, comports with the Act's purposes as expressed in the text and legislative history, and is consistent with OMB's administrative interpretation.

The government contends (Opp. 9) that its contrary interpretation is the only possible "logical[]" or "natural[]" one. But even the majority below, whose analysis the government parrots, admitted that this interpretation is not "strictly compelled by the statute's language." App. 13a. And the government's attempt to paper over the statutory anomalies produced by its acontextual interpretation succeeds only in highlighting and exacerbating them.

The government argues (Opp. 9) that Section 552a(g)(4)(A)'s use of the term "person entitled to recovery . . . functionally serves to describe that particular class of prevailing individuals who have established some level of actual damages" — an interpretation that necessarily contemplates a class of "prevailing" individuals who are entitled to *no recovery at all.*[1] This argument is certainly contrary to the ordinary definition of a "prevailing" party. *Cf. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001) (a plaintiff must "'receive at least some relief on the merits of his claim before he can be said to prevail'" (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)). It is also contrary to the government's own interpretation of the Act. Because the government contends that pleading and proof of actual damages is a necessary element of a Privacy Act claim, its absence would entitle the government to a dismissal or summary judgment; indeed, this is the very reason the decision below ordered summary judgment against Doe. An individual

[1] The Privacy Act does not permit injunctive relief in suits, like the present one, brought pursuant to Section 552a(g)(1)(D) for wrongful disclosures. *See* 5 U.S.C. §§ 552a(g)(1)(D), (g)(4); Pet. 4 n.1.

like Doe who finds himself on the wrong end of such a ruling can hardly be described as "prevailing."

The government strives (Opp. 10) — but fails — to give independent meaning to Section 552a(g)(1)(D)'s "adverse effect" requirement. *See* Pet. 17. Under the government's reading of the Act, a plaintiff must allege sufficient facts to support a claim for "actual damages" as a necessary element of his claim. Supportable allegations of this sort would necessarily satisfy the standing doctrine's "distinct and palpable" injury, "causation," and "redressability" requirements. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Thus, while Doe agrees that the "adverse effect" requirement serves a standing function (Pet. 17), that function is independently meaningful only if the Act permits a statutory damages award absent proof of actual damages.

Faced with these anomalies, and others demonstrated by Doe but not addressed by the opposition (*see* Pet. 16-20), the government falls back on a "sovereign immunity" canon of construction. Doe showed (Pet. 18) that this canon is inapposite where, as here, a statute explicitly waives sovereign immunity to suit and liability for money damages. As this Court has held repeatedly, the "exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Sur. Co.*, 338 U.S. 366, 383 (1949) (internal quotation marks and citation omitted). *Accord, e.g., United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945).[2]

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[2] The government criticizes (Opp. 10 n.5) Doe's showing (Pet. 18-20) that the decision below is contrary to the Privacy Act's legislative history on two grounds. *First*, it contends that the "sovereign immunity" canon bars any use of legislative history as interpretive guidance. But this canon does not apply to the Privacy Act. *See supra*; Pet. 18. Even if it did, legislative history remains a relevant interpretive aid. *See West v. Gibson*, 527 U.S. 212, 217 (1999). *Second*, the government contends that the Senate was discussing a more "generous" bill when it characterized the civil remedies provision as affording "liquidated damages." Although it is true that the Senate bill differed in some respects from the final Act, the cited paragraph in the committee report discusses "liquidated damages" without reference to other, later-discarded components of the bill. *See* Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy* at 768 (1976). Moreover, the same need for a "liquidated damages" provision was asserted in debate over the less "generous" House bill. *See id.* at 330.

Finally, the government's assertion (Opp. 11) that OMB's guidelines "do not address the predicate issue of whether some showing of actual damages must be made before a recovery will be allowed" is flatly contradicted by its own argument two pages earlier in the opposition. There, the government argued that a clear entitlement to statutory damages absent proof of actual damages could be "phrased . . . with a disjunctive 'or,' permitting recovery of $1000 *or* 'actual damages sustained.'" Opp. 9. This is how OMB phrased its interpretive guideline — liability is for "*actual damages or $1,000, whichever is greater.*" 40 Fed. Reg. 28,949, 28,970 (July 9, 1975) (emphasis added); *see also Waters*, 888 F.2d at 872; *supra* p. 4. Moreover, the government's assertion that the OMB "does not construe its Guidelines to require the payment of $1,000 in the absence of any showing of actual damages" is unburdened by any citation. To the extent the Department of Labor can purport to speak for the OMB, this "position" is plainly newly-minted for this litigation and therefore entitled to no deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

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